Sleeper Clauses
E-Resource Licenses

Not for the Faint of Heart

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Jurisdiction & Venue

- My place or yours? Or let’s figure it out later (aka silence)?
- Even “shall be governed by the law of ____” = not good enough
- Especially if a public/state institution – where else would it possibly be?
- Tied in with the Notice provision
- Including any mediation or arbitration, if you choose to agree to these
This Agreement shall be governed by and interpreted in accordance with the laws of the State of Louisiana. Venue of any such action brought with regard to the Agreement shall be in the Nineteenth Judicial Court, parish of East Baton Rouge, State of Louisiana, or United States District Court for the Middle District of Louisiana. Licensor agrees to submit to the personal jurisdiction of the State and Federal courts located in Baton Rouge in the State of Louisiana with respect to any legal proceedings that may arise in connection with this Agreement or from a dispute as to the interpretation or breach of this Agreement.
Related Notice Language

- General Notice language: Legal notices to Licensor given pursuant to this Agreement shall be provided by written or electronic mail message with confirmed receipt.
- Any legal notices or other legal documents provided to Licensor as provided above shall constitute valid legal service and Licensor expressly waives any further service of process otherwise required under the {insert relevant international treaty such as the Hague Convention}. 
Integration Clause

- This Agreement contains the entire understanding and agreement of the parties and replaces and supersedes any and all prior and contemporaneous agreements, communications, proposals and purchase orders, written or oral, between the parties with respect to the subject matter contained herein.
Contract: Rule of Interpretation

- Ambiguities are to be resolved against the drafter
- “The rule of contract construction by which any vague or ambiguous terms are to be construed against the drafter shall not apply to this Agreement.”
- “In resolving any dispute or construing any provision hereunder, there shall be no presumptions made or inferences drawn (i) because the attorneys for one of the parties drafted the agreement; (ii) because of the drafting history of the agreement; or (iii) because of the inclusion of a provision not contained in a prior draft, or the deletion of a provision contained in a prior draft.”
- La. Civ. C. 2056
- Do not accept this clause.
Acknowledge

• “To recognize (something) as being factual or valid.” Black’s Law Dictionary
• Accepting as accurate a fact asserted by another party
• Don’t ‘acknowledge’ something if you have no independent knowledge that it’s true
• Un(?)intended consequence – as to you – they don’t have to prove they hold copyright because you have admitted it as fact not in dispute
The Licensee acknowledges that all copyrights, patent rights, Licensor trademarks, service marks, database rights, trade secrets and other intellectual property rights relating to the Licensed Works are the sole and exclusive property of Licensor and that this Agreement does not convey to the Licensee any right, title, or interest therein.

You acknowledge and agree that the Content and the Site are the property of Licensor and protected by copyrights, trademarks, service marks, patents or other proprietary rights and laws.
The Fix: Just Say So

The Licensee acknowledges that All copyrights, patent rights, Licensor trademarks, service marks, database rights, trade secrets and other intellectual property rights relating to the Licensed Works are the sole and exclusive property of Licensor and that this Agreement does not convey to the Licensee any right, title, or interest therein.

You acknowledge and agree that The Content and the Site are the property of Licensor and protected by copyrights, trademarks, service marks, patents or other proprietary rights and laws.

Note: Licensor’s likely intended consequence – don’t want you disputing their copyright
Control User Behavior

- “Ensure”, “Warrant” or otherwise promise that your users will abide by the terms & conditions
- Looks like:
  - “Licensee shall use its best efforts to ensure that Authorized Users abide by the terms of this Agreement.”
  - “Licensee shall make best efforts to prevent the infringement of any intellectual property or other rights of Licensor in the Content by its Authorized Users.”
  - ensure that all Authorized Users are notified of and comply with the usage restrictions set forth in this License Agreement.” (SN)
More Control

- Not ok to even “use reasonable efforts to…” – Name one thing
- We cannot “protect” their IP
- We do not monitor user behavior
- We won’t agree to destroy (and certify) any content ever downloaded
“The Licensee shall use all reasonable efforts to protect the Licensed Materials from any use that is not permitted under this Agreement."  

“...reasonable and appropriate steps, both to ensure that such activity ceases and to prevent any recurrence".

“and take steps to protect the Licensed Materials from unauthorized use or other breach of this License; use reasonable endeavors to monitor compliance with the terms of this License,”
Here’s All You Can Agree To Do

- Use reasonable efforts to inform
- Use reasonable efforts to limit access
- Respond and “cooperate”… when become aware of unauthorized behavior
Website T & Cs

“Use of the MOoD is governed by the terms of service applicable to the use of any of The Metropolitan Opera (the "Met") family of websites, which may be found at the following address: http://www.metoperafamily.org/metopera/utility/terms_conditions.aspx, as modified by these MOoD Service Terms, which will govern to the extent of any inconsistency. In the event of any conflict between such terms and this Agreement, the terms of this Agreement shall prevail. The Met may change the terms of service applicable to The Metropolitan Opera family of websites at any time and Licensee's use including, without limitation, according Authorized Users the right to use the MOoD constitutes Licensee's agreement to the modified terms of service and all changes thereto.
End Users = AUs

- End User Terms: the terms applicable to use of the Publishers electronic database by Authorised Users, as stated on the Publisher’s website at End User Terms
  (http://www.emeraldgrouppublishing.com/about/policies/end_user_terms.pdf)
Mutual Force Majeure

“Neither party’s delay or failure to perform any provision of this Agreement as a result of circumstances beyond its control (including, but not limited to, war, strikes, fires, floods, power failures, telecommunications or Internet failures or damage to or destruction of any network facilities or servers) will be deemed a breach of this Agreement.”
“Sole Control”

“You give Licensor the sole right to control and direct the investigation, defense and settlement of each such claim, provided, Licensor shall not agree to any settlement or consent to any judgment that imposes restrictions or liability on you without your prior written consent, which consent shall not be unreasonably withheld.”
Final Comments

- Don’t give up rights you have
  - Jury trial
  - Statute of Limitations

A thought for perpetual access purchases, esp. e-books – you agree to be perpetually bound by T&C of use – shouldn’t that expire when work enters the public domain?
Questions? Comments?

- Thank you for your time and attention –
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